Alexandria NE LLC, *and* Teamsters Local 401 a/w International Brotherhood of Teamsters, AFL–CIO. Case 4–CA–32368

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On February 18, 2004, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1], and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donna Brown, Esq. (Anne Ritterspach, Esq., on brief), for the General Counsel.
Joseph P. Hofmann, Esq., for the Respondent.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 6, 2004. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee David Stavetski because of his union and other protected activity. Respondent filed an answer denying the essential allegations in the complaint. After the trial closed, the parties filed briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation, is engaged in the fabrication and distribution of wood moldings and banisters at its Wilkes-Barre, Pennsylvania plant. During a representative one-year period, Respondent purchased and received, from its Wilkes-Barre plant, goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

The Respondent's headquarters (Alexandria West) is located in Yakima, Washington, where Respondent also operates a plant that manufactures and distributes product. Another plant is located in Canada. In November 2002, Respondent opened its Wilkes-Barre plant, which is primarily a distribution center.

In April 2003, while the Wilkes-Barre plant was still in a start-up mode, Curtis Mattingly was appointed general manager of the plant. He was assisted by, among other officials, Warehouse Manager Mark McGlaughlin and Operations Manager Mike Lajoie. Mattingly dealt closely with Human Resources Manager Bob Rines, who was stationed at Alexandria West. Mattingly served as general manager of the Wilkes-Barre plant until the end of August 2003. The alleged discriminatee, David Stavetski, worked in the Wilkes-Barre warehouse, under the general supervision of McGlaughlin, from February 4, 2003, until his discharge on August 14, 2003.

Sometime toward the end of June, the Union filed an election petition seeking to represent Respondent's Wilkes-Barre employees. Pursuant to a stipulated election agreement, a Board election was scheduled for July 23, 2003, in an appropriate bargaining unit. In the campaign that followed, Respondent opposed the Union, but committed no unfair labor practices. Mattingly met with the employees on one occasion. He read a letter from Respondent's management stating that it opposed the election of the Union. He also told the employees of his own unfavorable experiences with a union. The election was

held as scheduled on July 23. The Union won the election by a vote of 13 to 12, but Respondent filed an objection to the election alleging that employee David Stavetski, who was the Union's observer during the election, threatened and harassed employees in order to get them to vote for the Union. After an investigation, the Regional Director, on September 2, 2003, issued a decision overruling the objection, finding that the alleged misconduct was either not attributable to Stavetski or the Union or was insufficient as a matter of law to adversely affect the election. Thus, the Regional Director upheld the election results and recommended that the Union be certified. No exceptions were filed to that decision, and, on October 3, 2003, the Board issued its final certification of the Union. As of the date of the hearing, the Respondent and the Union were engaged in negotiations for a first collective-bargaining agreement.

Beginning at the end of June and continuing into late July and early August, General Manager Mattingly made several changes in employee work hours and conditions. For example, when Mattingly took over, the plant operated only one shift, from 8 am to 4:30 p.m. Later, a second shift was added, thus creating an overlap between the end of one shift and the beginning of the other. Thereafter, at the request of the employees, including Stavetski, the start of the first shift was changed to 6:30 a.m., with a corresponding change in the end of the shift, to 3 p.m. At some point, Respondent also granted the second shift a flexible work-hour schedule that permitted the second shift employees to work 9 hours on each of 4 days and only 4 hours on Friday. Stavetski, on behalf of other employees, apparently asked for the same flexible schedule for the first shift employees. But Respondent declined because the flexible schedule was viewed unique to the second shift (Tr. 24–25, 26).

As part of his changes, Mattingly installed a time clock at the Wilkes-Barre plant, which became operational in late July or early August. Before its installation, the Wilkes-Barre plant used weekly time or sign in sheets to record the hours of employees and employees freely filled in each other's names and hours. Mattingly went to the time clock system at least in part because he thought that the existing sign in practice was flawed. Alexandria West itself operated a time clock system and the applicable employee handbook had rules on the use of timecards. Copies of the handbook, which was dated January 2003 and applied also, in relevant respects, to Alexandria West, were distributed to all employees upon their hire. According to the handbook, employees were not to "alter a time card for any reason whatsoever" or "fill out another employee's time card." Violation of these rules subjected an employee to discipline "up to and including termination." (Jt. Exh. 2(c), pp. 5–6.) The Wilkes-Barre employees were required to punch in and out when they arrived for and left work and left for and returned from lunch. They did not have to punch in and out for their morning and afternoon breaks. The employees' timecards were kept in a rack next to the time clock and the times were electronically entered by computer. In deciding to use a rack to store the timecards and to dispense with punching in and out for breaks, Mattingly considered the views of the employees, including Stavetski. When the timeclock was installed, Mattingly and an office clerical employee instructed the employees on its proper use.

Mattingly also made a change in the lunch period, from 11:30 a.m. to 12 noon to 11 to 11:30 a.m., which was announced to employees on August 13, 2003. The change was apparently the result of earlier changes, which had compressed the workday without a corresponding change in the lunch period, and Mattingly's view that production was dropping off late in the workday (Tr. 135–136, 180). A number of employees objected to this change, including Stavetski, who spoke to Mattingly separately about the matter, because many of the restaurants in the area were not open at that time and because, according to the employees, 11 a.m. was just too early for lunch (Tr. 140, 34). Mattingly also changed both the time and length of the breaks, but it is unclear from the record whether either of those changes or both were made at the same time as the change in the lunch period or at some earlier time (Tr. 32, 34–36, 78–82, 178–182). Mattingly reduced the length of the breaks from 15 minutes to 10 minutes, after consulting Human Resources Manager Rines, to comport with the Respondent's handbook, which provided for only 10 minute breaks (Tr. 131–132). As a result of the employees' objections, Mattingly immediately reversed his decision and reinstituted the lunch period, and perhaps the breaks, as before, except that the length of the breaks was kept at 15 minutes. The change lasted only one day, August 14, and the change back to the old lunch period was not effectuated on that day because the computer could not make the change immediately.

On August 14, shortly before 11:30 a.m., Mattingly was watching employees returning from lunch because he thought some of them were not actually returning to work after punching in. He stationed himself in a direct line and with an open view to the time clock area from about 20 to 25 feet away and observed employees punching in after their return from lunch. He observed Stavetski taking several timecards from the rack and swiping them through the time clock slot. Mattingly then called Stavetski toward him and asked Stavetski what he was doing. According to Mattingly, Stavetski said he was "swiping people as they come back from lunch." Mattingly told Stavetski that he was not to touch anyone else's timecard. Stavetski then apologized and said it would not happen again. Mattingly told Stavetski that he would have to "get back to you." (Tr. 152.)

Stavetski did not deny swiping the timecards of other employees or being called over to Mattingly at the time. He testified, however, that he was coming back from lunch with a group of 5 other employees, who authorized him to swipe their cards. Those other employees corroborated Stavetski on this point, but none of their testimony, nor that of Stavetski, is clear on when they actually returned from lunch or where exactly they were located when they authorized Stavetski to swipe their cards or when he actually swiped their cards. Indeed, it is not clear whether these other employees went to work immediately after coming in from lunch; some testified they went off to the lunchroom to finish their lunch or to store the remains from their lunch. In any event, the timecards indicate that all were swiped at 11:27 a.m., although some had also been swiped minutes before. Mattingly credibly testified that he saw only one employee, Asa Emel, near Stavetski when Stavetski was swiping the cards of other employees.

According to Stavetski, after Mattingly called him over and asked him what he was doing, Stavetski replied, "We just go[t] back from lunch. I was punching everyone in. Okay. Not a problem. And I proceeded to go to eat my lunch." (Tr. 73.)

I do not credit Stavetski's testimony on this point. Not only is Stavetski's testimony conclusory and truncated, in contrast to Mattingly's clearer, more detailed account, some of it makes no sense. For example, Stavetski does not identify who said, "Okay" and "Not a problem," but he implied that it was Mattingly. In view of what happened later and in the circumstances, I find it highly unlikely that Mattingly would have dismissed the matter so cavalierly. Moreover, Stavetski did not, according to his own testimony, tell Mattingly what, from his point of view, would have been the most exonerating fact in his story, that is, that other employees specifically asked him to swipe their cards. Had this been true, it would have been natural for Stavetski to tell Mattingly this up front. Even later that day, when Stavetski was told he had been fired, he did not volunteer, even in his own testimony about the termination, that he had been authorized by others to swipe their timecards or that the other employees had in fact returned to work at the time indicated. That Stavetski did not mention these matters to his superiors on these two occasions leads me to doubt not only the testimony of Stavetski, but also that of the other employees who supported Stavetski that they specifically authorized him to do so or that they did so while all returned together from lunch in the timecard area. Indeed, it appears from their testimony that they did not immediately return to work after they were swiped in. Stavetski certainly did not, because he admits that, after punching in, he proceeded to go eat his lunch. Thus, Mattingly's testimony about his concerns in observing the employees on their return from lunch also rings true.

My inability to credit Stavetski's account of his conversation with Mattingly leads me to conclude that Mattingly's account is more reliable. Also significant in my assessment of Mattingly's credibility is that, when he testified, he was no longer employed by Respondent and, unlike Stavetski, had no significant interest in the outcome of the case. Accordingly, I find that Stavetski essentially admitted he had done wrong in swiping the cards of other employees, as Mattingly credibly testified.

After Mattingly's conversation with Stavetski about the timecard swiping, he consulted Human Resources Manager Bob Rines in Arlington West by telephone. In fact they spoke at least twice by telephone about the matter. It was not unusual for Mattingly to consult with Rines on personnel matters; he had done so before. In the circumstances, it was Rines who made the actual decision to discharge Stavetski, after consulting the handbook rule on alteration of timecards and also consulting the general manager of Arlington West, who advised Rines that termination was the appropriate penalty for Stavetski's offense. Rines directed Mattingly to summarize what happened in an e-mail, and Mattingly did so later in the day; the e-mail was sent about 3 hours after the discharge. The relatively contemporaneous e-mail supports Mattingly's testimony about the incident. After receiving notification of Rines' decision, Mattingly met with Stavetski and Stavetski's supervisor, Warehouse Manager McGlaughlin. Stavetski was told that he was discharged. He punched out, according to his testimony, at 1:19 p.m.

After Stavetski's discharge, Mattingly met with the employees to inform them that Stavetski had been discharged for swiping the timecards of other employees, contrary to Respondent's policy.

B. Discussion and Analysis

Discriminatory motive cases, such as this one, are decided under the framework of the Board's decision in *Wright Line*.[1] The General Counsel must establish by a preponderance of the evidence that the employee's protected or union activity was a substantial or motivating factor in the challenged employer decision. Once the General Counsel makes an initial showing that the employer's decision was motivated by unlawful considerations, the burden of persuasion shifts to the employer to show that the same decision would have been made even in the absence of protected or union activity. In making his initial showing of discrimination, the General Counsel may rely on a showing that a respondent's reasons for the decision are pretextual. See *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997).

I find that the General Counsel has failed to make an initial showing that the discharge of Stavetski was motivated by unlawful considerations. Although it is clear that Stavetski was a known union adherent—he was, after all, the Union's observer in the July 23 election and he complained, along with other employees, about certain of Mattingly's postelection changes in hours and conditions—there is scant evidence that Respondent harbored any animus toward Stavetski for his protected conduct or that such animus was a motivating factor in his discharge. Nor, contrary to the General Counsel, can I find that the reason for the discharge was a pretext. Stavetski did, in fact, swipe the timecards of other employees, in apparent violation of a known rule against alteration of timecards. Although I agree with the General Counsel that the decision to discharge Stavetski, rather than give him a lesser discipline, was harsh, in the absence of stronger evidence than exists on this record that the decision was causally connected to his union or other protected activity, I cannot conclude that such harsh treatment was itself evidence of unlawful motivation.

As to animus, it is obvious that Respondent opposed the Union, but it is also clear that it kept its hands clean in the campaign leading to the election. It commited no unfair labor practices and Mattingly's single preelection meeting with employees about the Union was unremarkable. Despite an aggressive examination of Warehouse Manager Mark McGlaughlin after calling him as an adverse witness at the outset of the hearing, counsel for the General Counsel was unable to establish that he or any other management official harbored any animus against Stavetski for his union or other protected activity. McGlaughlin credibly testified, for example, that he refrained from talking to any employees about the Union prior to the election. Although the General Counsel elicited, from McGlaughlin, testimony that Stavetski and several other employees met with him after the

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

election, the meeting itself was insignificant. According to the testimony, which was not developed further through the General Counsel's employee witnesses, including Stavetski, the employees simply expressed the hope that "things would stay the same." (Tr. 30.) Indeed, McGlaughlin had little or nothing to do with either Stavetski's discharge, the work-hour changes instituted by Mattingly, or the responses by Mattingly to employee complaints about his changes.[2]

As for Mattingly, it has not been shown that he exhibited any animus towards Stavetski, either for his prounion position or for his complaints about Mattingly's changes in hours, which are alleged to constitute concerted, protected activities. Mattingly's changes were not alleged to be unlawful and they appeared to be based on legimate business concerns. Moreover, Mattingly quite willingly reversed or made adjustments to many of his changes in response to employee objections. The change to which Stavetski most strongly objected, the change in the lunch period, was immediately reversed, in great part due to the persuasiveness of Stavetski's arguments against it. Indeed, Stavetski was not the only employee to complain; nor was he specifically identified as a leader or a spokesman for the employees in making his objections to some of Mattingly's moves. Stavetski's own testimony seems to play down his leadership role. Although he apparently made some individual appeals to Mattingly, and perhaps McGlaughlin, he describes the complaints, if they can be called complaints, as coming from a number of employees, not just him. At one point, he testified as follows about the employees' views on the original lunch period change: "It wasn't a complaint. It was a topic of conversation, you know, we weren't happy . . . ." (Tr. 80.) Nor is there any evidence that the complaints or objections by Stavetski and the other employees were anything but civil and reasonable disagreements, which were met with the same civility and reasonableness on the part of Respondent. There appears to have been no acrimony on either side. Finally, there is absolutely no evidence that Mattingly resented Stavetski for having objected to some of his changes to such an extent that he would have punished Stavetski for his objections or sought a pretext to get rid of him.

The General Counsel does point to some evidence from which an inference of discriminatory motivation arguably could be made. For example, the Respondent did fashion an objection to the election from employee complaints that Stavetski had coerced and harassed them to support the Union. Human Resources Manager Rines, who apparently spent some time at the Wilkes-Barre plant during the period before and after the election, mentioned such reports to Stavetski. Apparently, Stavetski refused to talk to Rines about these reports. But there is no evidence that Rines persisted or coerced Stavetski on the matter. Although the reports of harassment were not found to have been sufficient to overturn the election results, the Respondent had every right to act on them and bring them to the attention of the Board in considering the validity of the election. There was no finding that the employee reports about Stavetski were bogus or induced or encouraged by Respondent. I cannot infer unlawful motive simply from Respondent's consideration of those employee reports by seeking Stavetski's response to them or filing an election objection based on them.

Another piece of evidence that might be thought to suggest antiunion motivation is Rines' candid testimony that, when he was considering how to handle Stavetski's timecard offense, he was aware of, and took into account, the implications of Stavetski's known prounion position. He testified that he wanted Mattingly's e-mail report of what had happened to substantiate the discharge decision because he was afraid that "the union or somebody would question it." (Tr. 210.) This proved prophetic since an unfair labor practice charge was indeed filed on the matter. I not only found Rines' testimony on the point an indication of his candor, but his consideration of the need to substantiate the discharge quite reasonable in the circumstances. It was not an indication that union animus motivated the discharge. It was an attempt to document what Respondent viewed as a legitimate personnel decision that might be challenged. Finally, also militating against a finding of animus or discriminatory motive is Respondent's lawful election campaign, its failure to pursue an appeal of the Regional Director's rejection of its objection based on Stavetski's alleged misconduct, and its decision to abide by the certification and begin negotiations with the Union as bargaining representative.[3]

The General Counsel contends that the reason given for the discharge of Stavetski, swiping the timecards of other employees, was a pretext. I reject that contention. Stavetski did indeed swipe the timecards of other employees. He admitted to Mattingly that he had done wrong. Indeed, even if he had been authorized by other employees to swipe their cards, as he and the others testified, that would not have excused what the Respondent viewed as misconduct warranting discipline. Respondent's rule was clear that alteration of timecards or filling out another employee's timecard was a punishable offense; the rule said nothing about mitigation of those offenses because such alteration or filling out was authorized by another employee. Stavetski and other employees knew of the handbook rule, or reasonably should have known of the rule, because the handbook had been distributed to them when they were hired, in Stavetski's case, about 6 months before he was discharged. Nor can it be argued that the handbook rule did not specifically

[2] Because of McGlaughlin's limited authority over the matters involved in this case, much of his testimony was not particularly relevant. At times, however, he provided the General Counsel with a better and more candid description of events than that provided by the General Counsel's main witness, David Stavetski. I am nevertheless puzzled as to why counsel for the General Counsel chose to call McGlaughlin as her first witness and to question him so much about decisions and policies that he had little or no knowledge of or control over. In any event, his calmness and candor under fire enhanced his credibility. I found him a totally reliable and credible witness.

[3] In her brief, counsel for the General Counsel points out that Stavetski's discharge occurred while the objection was pending decision by the Board. If this is an attempt to show that the timing of the discharge warranted an inference of animus or unlawful motivation, that attempt must fail. It is obvious that the only significant timing that impacted the discharge decision was the timing of the timecard incident that led to Stavetski's discharge. There is no evidence from which I can infer that the pendency of the election objection had anything to do with the discharge.

cover swiping other employees' timecards. Although the handbook rule spoke of alteration of or filling out timecards, that language clearly covered the swiping of timecards, which is the electronic equivalent.

Much testimony was elicited about whether Mattingly specifically informed employees, including Stavetski, during the timecard instructional meeting, that swiping the timecards of other employees was wrong and could subject an employee to discipline, including discharge. I believe that it is more likely than not that Mattingly did so, although six employees contradicted him on that point and the clerical employee who was present at the meeting was not called to corroborate Mattingly. It would have been natural for Mattingly to mention the rule during the meeting because it was stated in the handbook and Mattingly was a stickler for following the handbook. He had, after all, cut the break periods from 15 minutes to 10 because the prior policy had been in violation of the handbook. Moreover, installation of the timeclock was a response to the lax use of employee sign in sheets. In the last analysis, however, it does not really matter whether Mattingly specifically reminded employees of the handbook rule during the timecard instructional meeting. The existence of the timecard rule in a handbook distributed to all employees was sufficient notification to the employees of what was expected of them. Indeed, even without the rule, it would be reasonable for an employer to view seriously the swiping of other employees' timecards and it would be unreasonable for an employee not to know that this was wrong. Significantly, here, Stavetski admitted that he had wrongly swiped the timecards of other employees.[4]

The General Counsel also relies on the testimony of employee Asa Emel to show that the timecard swiping incident was not the real reason for Stavetski's discharge. I have doubts about the reliability of that testimony. But, even if I accepted it as credible, I do not agree with the General Counsel's take on it. According to Emel, he talked to Mattingly, McGlaughlin and Lajoie after the Stavetski discharge to protest it, threatening to quit out of loyalty to Stavetski. Emel was talked out of quitting, but he allegedly told the three officials that, since he and the other employees were present that day when Stavetski swiped their cards and had asked him to swipe their cards, they were just as guilty as Stavetski. This would have been the first time Mattingly learned that other employees had authorized Stavetski to swipe their cards. But, as I have indicated above, authorization by others for him to swipe their cards did not provide an excuse for Stavetski's offense. In these circumstances, Respondent's failure to punish those who had authorized the swiping of their cards, without more, does not establish that the discharge of Stavetski for swiping them was a pretext or discriminatorily motivated. In any event, by the time Emel spoke with Mattingly, Stavetski had already been discharged, pursuant to a decision by Respondent's human resources manager, who was not even located in Wilkes-Barre. Respondent's refusal to reverse its discharge decision just because of Emel's protest and suggestion that he and others had authorized Stavetski to swipe their cards does not establish pretext or discriminatory motive for the discharge.

Perhaps more to the General Counsel's point, Emel also testified that he was told by the management officials with whom he spoke that the swiping offense was not the only reason for Stavetski's discharge. According to Emel, when he asked why Respondent did not simply issue Stavetski a warning, the management officials told him there were "other things" they were "firing [him] for," apparently "stuff in [Stavetski's] personnel file," which they would not reveal to Emel. Mattingly could not recall whether any such statements were made, but McGlaughlin credibly denied that they were. Emel, on the other hand, was very close to Stavetski and was upset at the discharge. Although he is still employed and therefore testifying somewhat against his employer's interests, I find that Emel's testimony was more a product of his loyalty to Stavetski than a true and accurate reflection of what was said at the time. I find it highly unlikely that such statements were made. McGlaughlin and Lajoie played no role in the discharge decision, and there was no apparent reason for Mattingly, who was privy to the decision, to make such an arguably damaging admission to a friend of Stavetski's. Not only is there nothing else in the record that suggests the file contained evidence of another, perhaps discriminatory, motive, for the discharge, but the file itself contains mostly technical employment and background information. The only items in the file, as of the date of Stavetski's discharge, that would arguably have fit Emel's description were cryptic undated, hearsay statements, apparently from employees complaining about Stavetski. One related to a conversation between employees about the Union in which the employee said he was "confused and concerned" about a comment Stavetski made that might affect the employee's job. Those documents in Stavetski's file are too ambiguous and speculative either to support a finding of animus or to give credence to Emel's testimony. Indeed, even if I accepted Emel's account, it offers no compelling reason to infer that the reference to Stavetski's file meant that Stavetski's union or other concerted protected activity was the real reason for his discharge.

The General Counsel further alleges that Respondent treated Stavetski differently than another employee who was discharged at about this time. For example, the General Counsel points out that, in the discharge of employee Robert Swiatek about a week before that of Stavetski, Respondent conducted an investigation. It sought statements from other employees. Here, according to the General Counsel, Respondent did not conduct an investigation, neither talking to, nor seeking statements from, the employees whose timecards were swiped by Stavetski. The short answer to the General Counsel on this point is that the circumstances of the two cases were different. Swiatek was fired for using bad language toward, and being insubordi-

[4] I put little stock in the employee testimony elicited by the General Counsel that employees commonly swiped each others' timecards. First of all, the timecard system had only been in effect 2 or 3 weeks before the Stavetski discharge. This is hardly enough time to establish a past practice, much less a toleration of past practice, contrary to the handbook rule. Secondly, there is no evidence that management officials knew of or tolerated such practice. Finally, the record shows that it was common for other employees to fill out the names and hours of other employees on the weekly sign in sheets used before the installation of the time clock. In all the circumstances, I find it likely that the employees confused the past practice under the sign in sheet system with what happened after the time clock was installed.

nate to, a supervisor. There was apparently a dispute as to what had happened. In Stavetski's case, however, there was no such dispute. Stavetski not only admitted to Mattingly that he had swiped the timecards of other employees, but admitted he was wrong in doing so. In addition, Mattingly saw the swiping himself and Stavetski gave him no reason why the timecard swiping was not actionable. There was thus no reason for an investigation. Mattingly did not, however, act precipitously. He consulted Human Resources Manager Rines at Arlington West, who made the ultimate decision to discharge Stavetski.

The General Counsel also questions why Stavetski was not given a warning for the timecard swiping incident rather than being subject to discharge for a first offense. In this respect, the General Counsel points to a warning that was issued to employee Swiatek some 3 weeks prior to his discharge. The warning was for Swiatek's failure to report back to work at 11:30 a.m., as instructed, after being sent home from work because he had gotten no sleep the night before. I find that Swiatek's offense was much less serious that Stavetski's and thus the different treatment of Swiatek is not sufficient evidence of disparate treatment to show pretext in the discharge of Stavetski for an entirely different offense. The General Counsel offers no other evidence of relevant disparate treatment.[5] Indeed, on Mattingly's watch, a period of about 5 months, Respondent fired three Wilkes-Barre employees (one other, in addition to Swiatek and Stavetski). On each, Mattingly consulted Human Resources Manager Bob Rines. Thus, neither the discharge of Stavetski, nor the procedure used, was unusual.

It nevertheless disturbs me, as the trier-of-fact, that Respondent reacted to Stavetski's first-time offense of swiping other employees' timecards by discharging him rather than subjecting him to lesser punishment, which was certainly permissible under the Respondent's handbook rule. The time clock system was new and the result here is clearly a harsh application of the rule. Moreover, less than a week before, Stavetski had been given a favorable appraisal. Respondent admits that Stavetski was a good employee. In some cases, such evidence might lead to a finding of pretext or discriminatory motive, at least where there is other evidence that could help support such an inference. The record in this case, however, does not contain such other evidence. Compare *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), a leading case on the use of pretext to show discriminatory motive. In that case, the Court stated that if a trier-of-fact "finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference." Id. at 470. In *Shattuck Denn*, however, the surrounding facts included the following: The employer's manager, who effectuated the discharge, asserted, in the course of discussing the alleged discriminatee's grievance, that the union was submitting too many small grievances. Id. at 468. Compare also *United Parcel Service*, 340 NLRB No. 89 (2003) (slip. op at 2 and fn. 10) (pretext finding enhanced by statements made by management official who discharged alleged discriminatee, which indicated animus specifically addressed to him).

I do not think that, in this case, the General Counsel has proved a violation by a preponderance of the evidence. In the absence of evidence from which it can be inferred that the discharge was causally related to an animus specifically directed toward Stavetski because of his union or other protected concerted activity, I cannot conclude that the discharge was unlawfully motivated. Accordingly, I find that the General Counsel has failed to prove that the discharge was motivated by unlawful considerations.

CONCLUSION OF LAW

The General Counsel has failed to show by a preponderance of the evidence that Respondent violated Section 8 (a)(3) and (1) of the Act by discharging employee David Stavetski.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., February 18, 2004

[5] There was a brief reference in the record to an employee who was warned rather than discharged for an accident that amounted to a safety violation (Tr. 62), but that matter was so clearly different from Stavetski's timecard offense that it has little or no value for comparison purposes, except to show that Respondent sometimes warned employees rather than discharged them. The same applies to documentary evidence reflecting warnings for tardiness and absenteeism. Significantly, the Respondent's handbook did not contain a progressive disciplinary policy. Violations of certain listed work rules, including Stavetski's violation, were specifically identified as subjecting the employee to "discipline up to and including termination." Jt. Exh. 2(c) p. 5. In these circumstances, I cannot agree with the General Counsel's contention that, in practice, Respondent had a progressive disciplinary policy.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.